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No. 011534

IN THE

Supreme Court of the United States

TIMOTHY PATRICK KORNWOLF,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Of Counsel:
ROBERT D. MILLER
ROBERT D. MILLER
AND ASSOCIATES
111 Marquette
Avenue South
Suite 3102
Minneapolis, MN 55401
(612) 338-8678

ROBERT T. HAAR
Counsel of Record

SUSAN E. BINDLER
HAAR & WOODS, LLP
1010 Market Street,
Suite 1620
St. Louis, MO 63101
(314) 241-2224

Counsel for Petitioner

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

119pp+5/05

QUESTIONS PRESENTED

In *Andrus v. Allard*, 444 U.S. 51 (1979), this Court concluded that a ban on the sale of Indian artifacts with golden eagle feathers was not a taking in violation of the Fifth Amendment even if the feathered artifacts predated the Bald and Golden Eagle Protection Act, which imposed the ban in 1962. Since *Allard*, this Court has held that a statute burdening property is a violation of the Takings Clause if it does not "substantially advance" a legitimate state interest or deprives the owner of the economic value of his property. The courts below concluded that they were precluded by *Allard* from applying these standards to Petitioner's case, which involves a Native American headdress and Sioux dance shield obtained by his great uncle, about 1904, while working for Buffalo Bill's Wild West Show.

The questions presented are:

1. Is *Andrus v. Allard* still good law despite its inconsistency with subsequent opinions of this Court, the almost unanimous criticism of commentators, and the confusion it has promoted in the lower courts?

2. Is it an unconstitutional taking of private property to impose criminal sanctions on the sale of innocuous, historically significant, antique Indian artifacts containing golden eagle feathers where Petitioner's ownership of those artifacts predates the statutory protection of the golden eagle, there is no evidence that the ban on sale substantially advances protection of the golden eagle, and the effect of the ban is to destroy the economic value of the artifacts?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Timothy Patrick Kornwolf respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered January 16, 2002.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 276 F.3d 1014 (8th Cir. 2002), and is reprinted in the Appendix (App. A-3). The orders of the United States District Court for the District of Minnesota (Doty, J.) denying Petitioner's motions to dismiss the superseding indictment and the original indictment are unpublished and are reported in

the Appendix at A-25 and A-29, respectively. The report and recommendation of the magistrate with respect to each motion is unpublished. These recommendations are reprinted in the Appendix at A-32 and A-37.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered judgment on January 16, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. V provides in relevant part:

> [N]or shall private property be taken for public use, without just compensation.

The pertinent provisions of the Bald and Golden Eagle Protection Act, 16 U.S.C. §668(a), the Migratory Bird Treaty Act, 16 U.S.C. §§703, 707(b), and the regulations of the U.S. Fish and Wildlife Service, Department of the Interior, 50 C.F.R. §22.2(a)(1)-(2), are set out in the Appendix at A-45 to A-47.

STATEMENT OF THE CASE

On July 7, 2000, Petitioner Timothy Patrick Kornwolf ("Kornwolf") was charged with four counts of violating the Bald and Golden Eagle Protection Act, 16 U.S.C. §668 (hereinafter "Eagle Protection Act"). (App. A-53). The indictment arose out of Kornwolf's sale of a Sioux dance shield, and his offer to sell a Native American headdress, to an undercover Norwegian law enforcement officer working with the United States Fish and Wildlife Service. Both of these antique Indian artifacts

contained golden eagle feathers. (*See* color photographs at A-72 and A-73). On September 7, 2000, the government filed a superseding indictment which added four counts alleging violations of the Migratory Bird Treaty Act, 16 U.S.C. §703, based on the same conduct described in the original indictment. (App. A-48).

The dance shield and headdress had been in Kornwolf's family for almost a hundred years. Kornwolf's great uncle had acquired these items around 1904 while working for Buffalo Bill's Wild West Show. (App. A-56). It was undisputed below that he gave these items to Kornwolf prior to October 24, 1962, when the golden eagle was first included within the protections of the Eagle Protection Act.[1]

Under both the Eagle Protection Act and the Migratory Bird Treaty Act, it is unlawful to sell or attempt to sell golden eagle parts, such as feathers. In *Andrus v. Allard*, 444 U.S. 51 (1979), this Court construed these statutory bans as extending even to golden eagle feathers lawfully acquired prior to October 24, 1962, that were part of Indian artifacts.

Kornwolf moved to dismiss the indictments on the ground that banning the sale of antique feathered Indian artifacts that he owned prior to October 24, 1962, effectively destroyed the value of his property without compensation, in violation of the Takings Clause of the Fifth Amendment to the United States Constitution. The district court, the Honorable David S. Doty, over-

[1]The golden eagle did not come within the protection of the Migratory Bird Treaty Act until 1972, when the bird family "accipitridae" was added to the convention between the United States and Mexico. *Exchange of Notes*, U.S. - Mexico, March 10, 1972, 23 U.S.T. 260.

ruled these motions. He concluded that Kornwolf's Fifth Amendment argument was controlled by *Andrus v. Allard*, where over twenty-two years ago this Court rejected a Fifth Amendment challenge to these statutes. In denying the motion to dismiss the superseding indictment, the district court stated:

> This court's ruling on the prior motion to dismiss and the magistrate judge's recommendation on the current motion to dismiss make it clear that unless the Supreme Court overrules *Allard*, the congressional prohibition on the sale of *all* eagle feathers stands as a lawful means to protect and preserve threatened and endangered bird species.

(App. A-27) (emphasis in original).

On October 31, 2000, Kornwolf entered a conditional plea to four counts of the superseding indictment. The plea specifically reserved Kornwolf's right to withdraw his plea if on appeal the Eagle Protection Act and the Migratory Bird Treaty Act were held unconstitutional as applied to the facts of this case. (App. A-69 at ¶16). Kornwolf was sentenced to three years probation, with a special condition of 180 days in a home detention program, and a fine of $10,000. (App. A-15 to A-19). Because his appeal raised "a substantial question of law," the district court stayed Kornwolf's sentence pending appeal. (App. A-11).

On appeal, Kornwolf argued that the legal analysis that this Court employed in *Andrus v. Allard* has been eviscerated by subsequent opinions of this Court, including *Agins v. Tiburon*, 447 U.S. 255 (1980); *Hodel v. Irving*, 481 U.S. 704 (1987); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); and *Babbitt*

v. Youpee, 519 U.S. 234 (1997). Under these more recent precedents, the relevant questions are: (1) whether prohibiting the sale of antique Indian artifacts that include golden eagle feathers, even if they have a known provenance that predates 1962, substantially advances the protection of the golden eagle; and (2) whether the ban on sale of these artifacts deprives Kornwolf of the economic value of his property.

The district court found that it was precluded from undertaking this analysis by *Andrus v. Allard*. In the magistrate's report and recommendation to the district court on the motion to dismiss the superseding indictment, the magistrate observed:

> The Supreme Court has repeatedly held that if a precedent of the Court has direct application in a case, yet appears to rest on reasons rejected in another line of Supreme Court decisions, the lower courts must follow the case which directly controls, leaving the Supreme Court to overrule its own decision if it so chooses. *Agostini v. Felton*, 521 U.S. 203, 237 (1997); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

(App. A-34). This report and recommendation was adopted by the district court. (App. A-25).

Kornwolf argued on appeal that *Andrus v. Allard* did not directly control his case. *Allard* was a declaratory judgment action that in essence mounted a facial challenge to the constitutionality of the Eagle Protection Act and the Migratory Bird Treaty Act. The only constitutional question before the *Allard* Court was whether banning the sale of feathers obtained from golden eagles killed prior to 1962 was unconstitutional *under any and all circumstances*. The Court did not discuss the prov-

enance or value of any of the artifacts owned by the plaintiffs in that case. In fact, there was no evidence in *Allard* that any of the plaintiffs had possessed any of their feathered artifacts prior to 1962. 444 U.S. at 64 n. 21.

Therefore, Kornwolf maintained on appeal that the *Allard* Court did not address the specific question raised by this case, *i.e.*, whether, as a constitutional matter, an individual can be criminally prosecuted for sale of specific artifacts that contain golden eagle feathers despite uncontroverted evidence that he came into possession of those artifacts prior to 1962. Since *Allard* did not directly control his case, Kornwolf argued that the court of appeals had to review his conviction in light of this Court's more recent takings jurisprudence.

The United States Court of Appeals for the Eighth Circuit disagreed. *United States v. Kornwolf*, 276 F.3d 1014 (8th Cir. 2002). In an opinion by Senior Judge Donald Lay, the court concluded that *Allard* was directly controlling and that, as a result, it "need not examine the present case in light of recent takings cases." (App. A-9). The Eighth Circuit stayed issuance of the mandate pending disposition of this Petition for a Writ of Certiorari. (App. A-2).

REASONS FOR GRANTING THE WRIT

This case presents the Court with apparently its first direct opportunity in almost twenty-three years to reconsider the holding and logic of its opinion in *Andrus v. Allard*, 444 U.S. 51 (1979). As a historical matter, *Allard* is the high-water mark of this Court's solicitude to governmental regulation of private property. Prior to *Allard*, a three-judge court could accurately report "that the Supreme Court has never upheld the power of

Congress to deprive a person forever of the right to dispose of his private property through commercial channels where such property was legally acquired – in contravention of no public policy – and where the property is not only harmless in itself, but also has intrinsic value." *Allard v. Andrus*, 9 Envtl. L. Rep. 20787, 20789 (D.Colo. 1978), *rev'd sub nom. Andrus v. Allard*, 444 U.S. 51 (1979).

Since *Allard*, this Court has decided a number of takings cases that demonstrate both a greater concern for the burdens placed on property owners by governmental regulations and less willingness to assume a justifying nexus between those burdens and a public purpose. Indeed, where regulation effectively destroys the economic value of private property, which is precisely the intended effect of the species protection acts at issue here, this Court has in recent years presumed an unconstitutional taking subject to the government demonstrating that the restriction on the owner's property is justified by the law of nuisance. The government has not maintained, nor could it credibly maintain, that the sale of antique Indian artifacts is a nuisance.

These developments have left *Allard* an anomalous and puzzling precedent that has promoted confusion about, and disparate interpretations of, this Court's takings cases. It should be overruled or otherwise reconciled with the subsequent takings opinions of this Court.

I

Andrus v. Allard Conflicts with Subsequent Opinions of This Court That Have Required a Regulation Burdening Property "Substantially Advance Legitimate State Interests"

The *Allard* Court reviewed the judgment of a three-judge court, which had concluded that, since it had "grave doubts whether [the Eagle Protection Act and the Migratory Bird Treaty Act] would be constitutional if they were construed to apply to pre-act bird products," these acts should be interpreted as "not applicable to preexisting, legally-obtained bird parts or products therefrom...." *Allard v. Andrus*, 9 Envtl.L.Rep. 20787, 20789 (D.Colo. 1978). The three-judge court observed:

> The application of these acts to the plaintiffs' artifacts has a destructive and confiscatory effect on preexisting property rights in these items. The questioned regulations have destroyed the right to sell them. Assuming that there is no "scientific method" for detecting the age of feathers, these statutes may be enforced by less drastic regulatory procedures, including affidavits of acquisition, registration by business records or marking, and expert examination. The defendants have failed to show any efforts to establish a registration system.

Id. at 20788.

In his opinion for the Court reversing this judgment, Justice Brennan cited two principal grounds for upholding application of the statutes to pre-existing artifacts: that the prohibition on sale of bird parts lawfully obtained was consistent with the wording of the statutes and "reasonable," *Andrus v. Allard*, 444 U.S. 51, 58

(1979), and that the destruction of one "strand" in the owner's bundle of rights in these artifacts is not a taking. *Id.* at 65-66. Both grounds have been undermined or explicitly rejected by subsequent opinions of this Court.

A. Andrus v. Allard *Applied a "Rational Basis" Test Rather Than the "Substantially Advance" Standard in Evaluating the Nexus Between the Ban on Sale and Protection of the Golden Eagle*

Although the legislative history of the Eagle Protection Act was silent on the logic of extending the Act's prohibitions to the sale of pre-existing bird parts, in *Allard,* Justice Brennan *speculated* that Congress might have been concerned that if the sale of pre-existing bird parts was not prohibited, the statute might be evaded "because there is no sure means by which to determine the age of bird feathers" and that "feathers recently taken can easily be passed off as having been obtained long ago." *Id.* at 58. There would therefore be an incentive to kill live eagles. Moreover, Justice Brennan concluded, "even if there were alternative ways to insure against statutory evasion, Congress was free to choose the method it found most efficacious and convenient." *Id.* at 58-59.

Justice Brennan's references to possible legislative justifications for banning the sale of pre-existing bird parts were not part of his discussion of the Fifth Amendment takings claim. Rather they were part of his statutory analysis, where the question was whether it was "rational" to interpret these statutes as banning the sale of pre-existing bird parts. *See id.* at 55-64. This suggests that either the *Allard* Court did not regard the

justification for the ban on sale as pertinent to the Fifth Amendment analysis, or it concluded that the question under the Fifth Amendment was merely the same, *i.e.*, whether there was a rational relationship between the ban on sale of pre-existing parts and protection of the golden eagle.

This Court's Fifth Amendment takings cases since *Allard*, however, have required that a regulation burdening private property be justified by its ability to achieve a legitimate governmental purpose. In *Agins v. Tiburon*, 447 U.S. 255 (1980), this Court observed that a regulation affecting property constitutes a taking under the Fifth Amendment if it does not "substantially advance legitimate state interests" or denies an owner economically viable use of his property. *Id.* at 260.

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court emphasized that the "substantially advance" standard is not the same as the rational basis test. Justice Scalia observed for the *Nollan* Court, "We have required [in takings cases] that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, *Agins v. Tiburon*, 447 U.S. 255, 260 (1980), not that 'the State *"could rationally have decided"* that the measure adopted might achieve the State's objective.'" *Nollan*, 483 U.S. at 834 n.3 (emphasis in original). Yet the latter "rational basis" test was the standard applied in *Allard*.

No court has determined that the prohibition on sale of Indian artifacts containing lawfully obtained golden eagle parts "substantially advances" protection of the golden eagle. The government has presented "no evidence of any causal relation between the killing of eagles (or other birds) and the sale of Indian artifacts

containing bird feathers." William K. Jones, *Confiscation: A Rationale of the Law of Takings*, 24 Hofstra L. Rev. 1, 67 (1995) (characterizing *Allard* as unsound).[2] Moreover, as the *Allard* three-judge court and commentators have observed, the statutes protecting the golden eagle could have been "enforced by less drastic regulatory procedures, including affidavits of acquisition, registration by business records or marking, and expert examination."[3] *Allard v. Andrus*, 9 Envtl. L. Rep. 20787, 20788 (D. Colo. 1978). *See also* Jones, *supra*, at 68; Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 Colum. L. Rev. 931, 945 (1985) ("a number of alternatives were open to the Interior Department that would have provided some form of compensation without undermining the legislative purpose").

In *Allard*, Justice Brennan ultimately concluded that

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[2] Professor William K. Jones, the Charles Evans Hughes Professor of Law at the Columbia University School of Law, reviewed the briefs and record before this Court in *Allard* and concluded that the "Government was compelled to rely on the proposition that the regulation should be sustained if supported by 'any state of facts either known or which could reasonably be assumed.'" William K. Jones, *Confiscation: A Rationale of the Law of Takings*, 24 Hofstra L. Rev. 1, 67-68 (1995).

[3] This Court has acknowledged that "concerns for proportionality animate the Takings Clause." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999). It has found that a regulation that burdens private property is constitutionally deficient when the asserted governmental interest could have been advanced by a more narrowly drawn restriction. *See, e.g., Babbitt v. Youpee*, 519 U.S. 234, 245 (1997) (statute prohibited devise of property that involved only one heir and therefore did not further fractionate Indian land holdings); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (land use regulation unconstitutional where not roughly proportional to legitimate state interest).

it was administratively convenient for Congress to ban the sale of artifacts with eagle feathers even when the feathers were lawfully obtained. If "administrative convenience," however, is enough to "substantially advance" a legitimate state interest, this prong of the *Agins* test is meaningless. It would be a rare case where it would not be administratively convenient to force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). While administrative convenience may be an appropriate justification under a "rational basis" test, it cannot be enough to "substantially advance" a legitimate state interest. *See generally Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 150-53 (1980) (administrative convenience is generally insufficient to show gender-based discrimination is "substantially related" to important governmental objectives).

B. Andrus v. Allard *Has Promoted Confusion in the Lower Courts on the Applicability of the "Substantially Advance" Standard*

Allard, therefore, has helped promote confusion in the lower courts about whether the "substantially advance" test in fact applies to all takings cases and whether, in substance, it is different from the rational basis test. As one commentator has observed, "Because of this ambiguity in Supreme Court opinions, lower courts have disagreed on whether takings jurisprudence now requires a closer examination of the means-end relationship between regulations and the goals of the government." Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 Nw. U. L. Rev. 591, 604 (1998). Interpretations in the lower courts have ranged from "substantially advance"

being a universally applicable "least restrictive means" standard,[4] to a variable standard that depends on the context in which it is applied,[5] to a mere test of "arbitrariness" or unreasonableness.[6] The United States Court of Appeals for the Ninth Circuit has further confused the standard by stating that the "substantially advance" standard is not a reasonableness test, yet finding it can be satisfied by a "reasonable relationship" between the regulation and the governmental purpose.[7] As one state supreme court judge has commented on the "substantially advance" standard:

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[4]*McElwain v. County of Flathead*, 248 Mont. 231, 235, 811 P.2d 1267, 1270 (Mont. 1991), *cert. denied*, 502 U.S. 1030 (1992).

[5]*San Remo Hotel L.P. v. City and County of San Francisco*, 27 Cal.4th 643, 665-72, 41 P.3d 87, 117 Cal.Rptr.2d 269, 286-92 (Cal. 2002) ("substantially advance" standard applied differently depending on type of government restriction under consideration; development exactions receive highest scrutiny; in other contexts standard means "reasonable relationship"); *Dep't of Natural Resources v. Indiana Coal Council, Inc.*, 542 N.E.2d 1000, 1005-06 (Ind. 1989), ("substantially advance" standard not particular level of scrutiny to be applied across the board), *cert. denied*, 493 U.S. 1078 (1990)

[6]*Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal.4th 952, 972, 968 P.2d 993, 1005, 81 Cal.Rptr.2d 93, 105 (Cal.) ("legislation may not be invalidated under the 'substantially advance' prong of takings analysis unless it 'constitutes an arbitrary regulation of property rights'"), *cert. denied*, 526 U.S. 1131 (1999); *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 94 N.Y.2d 96, 107-08, 721 N.E.2d 971, 975-76, 699 N.Y.S.2d 721, 725-26 (N.Y. 1999) ("substantially advance" standard in takings cases not involving exactions is "reasonable relationship" test; availability of less restrictive options is irrelevant), *cert. denied*, 529 U.S. 1094 (2000).

[7]*Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030, 1036-37, 1041-42 (9th Cir. 2000), *cert. denied*, 532 U.S. 942 (2001); *see also Commercial Builders v. City of Sacramento*, 941 F.2d 872, 875 (9th Cir.

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> [T]here are grounds for reasonable debate as to the meaning of that test in just compensation law outside the *Nollan / Dolan* context. Does it require only a rational relationship between the regulation and its purpose? Or a closer connection between means and ends, adapted from the *Nollan / Dolan* test? Or some other degree of connection between means and ends? I urge the high court to resolve this uncertainty.

Santa Monica Beach, Ltd. v. Superior Court, 19 Cal.4th 952, 981, 968 P.2d 993, 1012, 81 Cal.Rptr.2d 93, 112 (Cal.) (Kennard, J., concurring), *cert. denied*, 526 U.S. 1131 (1999). *See also Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 934 (Tex. Sup. Ct. 1998) ("what relation between a regulation and the state interest satisfies the 'substantially advance' requirement in a regulatory takings case has not been clarified by the United States Supreme Court"), *cert. denied*, 526 U.S. 1144 (1999).

This case is an excellent vehicle to address these questions. Given the unique factual context of most takings cases, it is difficult for lower courts to draw out principles of general applicability. However, that is not true of this case. It arises in a context that is factually straightforward, and the case has a historical benchmark in *Allard*. No court has asked, let alone determined, whether the ban on sale of antique Indian artifacts that include lawfully-acquired golden eagle feathers "substantially advances" protection of the golden

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Footnote 7 Continued

1991) ("*Nollan* holds that where there is *no* evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld") (emphasis added), *cert. denied*, 504 U.S. 931 (1992).

eagle. A reexamination of the ban on sale of lawfully acquired golden eagle feathers with the benefit of the last twenty years of takings jurisprudence will provide the lower courts with intelligible guidance on the applicability and meaning of the "substantially advance" standard in takings cases generally.

II

In Subsequent Opinions This Court Has Rejected the Conclusion in *Andrus v. Allard* That the Destruction of One "Strand" of a Bundle of Rights Does Not Constitute a Taking

The lack of a justifying nexus in *Allard* is far from its only inconsistency with subsequent decisions of this Court. Even where a regulation "substantially advances" a legitimate governmental interest, the effect of that regulation on private property constitutes a compensable taking under the Fifth Amendment if it denies an owner "economically viable" use of his property. *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). In *Allard*, Justice Brennan acknowledged as "undeniable" the proposition that the prohibition on sale of bird parts that were lawfully obtained deprived owners of antique feathered Indian artifacts of the most profitable use of their property. *Allard*, 444 U.S. at 66. Indian artifacts containing eagle feathers, for example, either cannot be sold or can only be sold by destroying the integrity and authenticity of the artifact by removing the original feathers.[8]

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[8]One of the unfortunate consequences of *Allard* is the incentive it creates to destroy historically significant Indian artifacts. Ronald McCoy, Professor of History at Emporia State University, has lamented "the wholesale defacement of many pieces of art as

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Justice Brennan downplayed the significance of the ban on sale of these items and tried to identify some residual value they might have:

> The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of

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Footnote 8 Continued

feathers are stripped away prior to sale." Ronald McCoy, *Legal Briefs: Feathers*, 16 Am. Indian Art Mag. 20 (No. 3, Summer 1991).

The Appendix includes a letter which illustrates the difficult quandary facing those who inherit historically significant feathered Indian artifacts. Members of the Fraser Douglass family in Cincinnati inherited two Cheyenne Indian shields containing golden eagle feathers. The shields had been part of the studio collection of the western American artist, Henry Farny, who died in 1916. One of the shields is prominent in a Farny painting at the Amon Carter Museum in Fort Worth, Texas. Because of the Eagle Protection Act, the Fraser Douglass family cannot sell the shields without destroying the integrity of these historically significant pieces. As their attorney writes:

> The Douglass family is representative of people in this country who, on working people's earnings, collected and cared for objects like these without realizing the part they were playing in preserving these for all of us for all time. The vision of a Northern Cheyenne Indian warrior making a shield of buffalo hide, natural paint and eagle feathers, to aid him in resisting the westward expansion of the 19th century while defending his homeland against overwhelming and decimating odds defines the American spirit of which we are all so proud. Now, notwithstanding the historical and symbolic importance of these shields, they cannot be legally sold by families in legal possession of them, even though the objects predate every applicable law by decades.

Letter from W. Roger Fry to Robert T. Haar 2 (March 19, 2002) (App. A-75).

> disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety.... In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds.

Allard, 444 U.S. at 65-66.

Justice Brennan speculated that the owners might not have lost all economic benefit of their investment in the artifacts because "they might exhibit the artifacts for an admissions charge." *Id.* at 66.[9] Justice Brennan then suggested that even if the owners lost all economic benefit, it did not matter. "[L]oss of future profits – unaccompanied by any physical property restriction – provides a slender reed upon which to rest a takings claim." *Id.*

In the years since *Allard*, this Court has rejected this notion that the destruction of one "strand" of a bundle of rights is insufficient to constitute a taking. In *Hodel v. Irving*, 481 U.S. 704 (1987), the Court held that the loss of one strand – the ability to devise or pass by intestate succession even nominal interests in real property – was a compensable taking under the Fifth Amendment. In holding a section of the Indian Land Consolidation Act of 1983 unconstitutional, this Court in an opinion by Justice O'Connor, observed:

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[9]As Professor Jones has pointed out, "[T]he availability of profits from display was a fiction fabricated by the Government; all the evidence of record established that the artifacts were without value absent the ability to sell." Jones, *supra* note 2, at 68.

> The fact that it may be possible for the owners of these interests to effectively control disposition upon death through complex *inter vivos* transactions such as revocable trusts is simply not an adequate substitute for the rights taken, given the nature of the property.... Since the escheatable interests are not, as the United States argues, necessarily *de minimis*, nor, as it also argues, does the availability of *inter vivos* transfer obviate the need for descent and devise, a *total* abrogation of these rights cannot be upheld. **But cf. *Andrus v. Allard*, 444 U.S. 51 (1979) (upholding abrogation of the right to sell endangered eagles' parts as necessary to environmental protection regulatory scheme).**

Irving, 481 U.S. at 716-17 (emphasis added).

This extraordinary inclusion in an opinion of this Court of a "But cf." cite to a prior holding of the Court appears to be a frank acknowledgement of the inconsistency between *Hodel v. Irving* and *Allard*. That inconsistency was effectively conceded by three members of the *Irving* majority. Justice Scalia, in a concurring opinion joined by the Chief Justice and Justice Powell, stated:

> [T]he present statute, insofar as concerns the balance between rights taken and rights left untouched, is indistinguishable from the statute that was at issue in *Andrus v. Allard*, 444 U.S. 51 (1979). Because that comparison is determinative of whether there has been a taking . . . in finding a taking today our decision effectively limits *Allard* to its facts.

Irving, 481 U.S. at 719. Commentators have also noted

that there is no logical way to reconcile the holdings in *Allard* and *Irving*.[10] Short of direct appropriation, there is no greater burden that the government can place on property than prohibiting its transfer for value.[11] This tension between *Allard* and *Irving* was exacerbated a few Terms ago when the logic of *Irving* was reprised in *Babbitt v. Youpee*, 519 U.S. 234 (1997).

The loss imposed on owners of antique Indian artifacts is certainly more than "de minimis," *Irving*, 481 U.S. at 717 or "palpable," *Youpee*, 519 U.S. at 244. The items of personal property that Kornwolf was prosecuted for selling are substantially more valuable than the interests in allotted land at issue in *Irving* and *Youpee*, which ranged from $100 to $2700. *Irving*, 481 U.S. at 709-10; *Youpee*, 519 U.S. at 243. Also the property owners in *Irving* and *Youpee* retained full beneficial use of the property during their lifetimes as well as the right to sell or otherwise convey it *inter vivos*. *Irving*, 481 U.S. at 714-15.

"The right of sale is part (perhaps the most valuable

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[10]*See, e.g.*, Douglas W. Kmiec, *The Original Understanding of the Taking Clause is Neither Weak Nor Obtuse*, 88 Colum.L.Rev. 1630, 1663 (1988) (holding in *Irving* leaves "*Andrus v. Allard* dangling in the wind"); Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 Nw.U.L.Rev. 591, 592 (1998) ("how is one to understand a doctrine... that protects the right to bequeath property but not the right to sell property").

[11]*See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922) ("To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1033-34 (1992) (Kennedy, J., concurring in the judgment) (a finding of "valueless" "appears to presume that the property has no significant market value or resale potential").

part) of the right of disposition." Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 76 (1985). As Professor Jed Rubenfeld of the Yale Law School has observed, "According to what criteria could the Court plausibly decide that the right to bequeath property is fundamental, but that the right to sell it is not?" Jed Rubenfeld, *Usings*, 102 Yale L.J. 1077, 1105 (1993). This inexplicable dichotomy has led lower courts to conclude that the right to dispose of property by sale is not a fundamental aspect of property ownership under the Fifth Amendment, even though in *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945), the Court described the right to dispose of a thing as inherent in the concept of property.[12]

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[12]In *Manufactured Housing Communities of Washington v. State*, 142 Wash.2d 347, 13 P.3d 183 (Wash. 2000), the Washington Supreme Court held unconstitutional under the takings clause of its state constitution a statute that required owners of mobile home parks to give to tenants a right of first refusal to buy the park. Washington's highest court concluded that the "ability to sell and transfer property is a fundamental aspect of property ownership." *Id.* at 368, 13 P.3d at 193. In basing its decision on the state constitution, the Washington Supreme Court departed from a long history of holding that the takings clauses of the state constitution and the Fifth Amendment were coextensive. It is apparent from the dissent in *Manufactured Housing Communities* that this departure was prompted by *Allard*. Noting that the regulatory burden was much more onerous on the artifact owners in *Allard*, who lost their right to sell, than the mobile home park owners, who only had to afford a right of first refusal, the dissent relied heavily on *Allard*. The dissent argued that the U.S. Supreme Court "has never accorded 'essential' status to the fundamental attribute of property asserted in this case, the right to dispose of property." *Id.* at 418-19, 13 P.3d at 219-20 (Talmadge, J., dissenting). In *Greenfield Country Estates Tenants Association, Inc. v. Deep*, 423 Mass. 81, 666 N.E.2d 988 (Mass. 1996), the Supreme Judicial Court of Massachusetts found a similar mobile home statute constitutional in reliance on *Allard*.

III

The Destruction of All Economically Beneficial or Productive Use of Antique Feathered Indian Artifacts Is a Taking Under the Logic of *Lucas v. South Carolina Coastal Council*

Allard's anomalous status in this Court's jurisprudence is most dramatically demonstrated by *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). There this Court held, in the land-use context, that if a regulation eliminates all economically beneficial or productive use of property, there is a categorical taking regardless of the societal benefits that may flow from the regulation and regardless of the other property rights the owner may have retained. *Id.* at 1026-29. The only qualification to this rule is where there are limitations on the use of property that "inhere in the title itself" or in "background principles of the State's law of property and nuisance." *Id.* at 1029. That the owner can continue to possess and enjoy the property, devise and donate it, and even sell it, does not matter for Fifth Amendment "takings" purposes where all economically beneficial use is prohibited.

Certainly Kornwolf has been denied all "economically beneficial use" of the Native American headdress and Sioux dance shield. In its arguments before the court of appeals, the government conceded that not only the effect, but the intent of the ban on sale of golden eagle feathers was to "destroy the market" for those items. Govt. Brief at 16. Logically, if the market for an item is destroyed, so is its economic value. As Professor William K. Jones of the Columbia Law School noted in his discussion of *Allard*:

> Avian artifacts antedating the protective legislation were not contraband, akin to alcoholic beverages following prohibition legislation; the continued possession, display, and transfer of such artifacts contravened no social norm, old or new. Further, the regulations at issue completely destroyed the commercial value of such artifacts. What cannot be sold cannot possess a market value; there is no market.

Jones, *supra*, at 68.

The *Lucas* Court attempted to address this tension between *Lucas* and *Allard* in dicta. Unfortunately, that dicta has further confused takings analysis in the lower courts. *Lucas* was a real property case; it involved an environmental restriction that prevented the owner from building single family homes on his beachfront property. *Lucas*, 505 U.S. at 1006-07. The *Lucas* Court in dicta distinguished personal property from real property by stating that by reason of the State's traditionally high degree of control over commercial dealings, the owner of personal property "ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)." *Id.* at 1027-28. In this context the Court cited *Allard*, implicitly recognizing that the effect of the prohibition on sale of bird parts lawfully obtained destroyed the economic value of antique artifacts.

This distinction between real and personal property finds no support in the text or history of the Fifth Amendment. Its author, James Madison, believed that "private property" included "merchandize" as well as land. 14 James Madison, *The Papers of James Madison*

266 (R.Rutland & T. Mason eds. 1983) (essay entitled "Property"). *See generally* William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 712 (1985).

Moreover, there is no reason Kornwolf should have been aware prior to 1962 "of the possibility that new regulation might even render his property economically worthless." As this Court has itself observed:

> The Eagle Protection Act was originally passed in 1940.... Its prohibitions related only to bald eagles; it cast no shadow on hunting of the more plentiful golden eagle.

United States v. Dion, 476 U.S. 734, 740-41 (1986). There was much more reason for Lucas to anticipate in the 1980s that his beachfront property would be subject to future regulation to preserve wetlands and to prevent overdevelopment of South Carolina's coastline than for Kornwolf to believe that the government would ban the sale of an innocuous, antique Indian headdress or shield.[13]

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[13]Indeed, the South Carolina Coastal Council argued in *Lucas* that Lucas' position was very similar to that of the property owners in *Allard*. It pointed out that the Indian artifact dealers faced "a diminution in value and loss of the use in *Allard* at least as significant from a percentage standpoint as in the present case." Respondent's Brief on the Merits at 48 n.41, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

Professor Rubenfeld has commented:

> But why, we might want to know, does the category of "the State's traditionally high degree of control over commercial dealings" extend to modern species-preservation laws if it

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Despite this Court's *Lucas* dicta, most lower courts that have confronted the question have concluded that per se takings rules, including that articulated in *Lucas*, are fully applicable to personal property. *See, e.g., Nixon v. United States*, 978 F.2d 1269, 1284-87 (D.C.Cir. 1992); *Maritrans Inc. v. United States*, 40 Fed.Cl. 790, 797-99 (1998); *Long Cove Club Associates, L.P. v. Town of Hilton Head Island*, 319 S.C. 30, 458 S.E.2d 757 (S.C.), *cert. denied*, 516 U.S. 1029 (1995). *But see Wilson v. City of Louisville*, 957 F.Supp. 948, 954-55 (W.D.Ky. 1997) (citing *Lucas* dicta for proposition "that a regulation could render personal property valueless without constituting a taking"). However, application of the per se takings rule in *Lucas* to personal property squarely conflicts with *Allard* as well as the prosecution of Kornwolf in this case.

A recent takings case illustrates the disparate treat-

Footnote 13 Continued

> does not extend to modern beachfront-preservation laws? And exactly why should the hunter of (or dealer in) eagles have been aware of the possibility that new regulation might render his property worthless? Surely not because the state exercised a "traditionally high degree of control" over the spoils of hunting in 1789. Is it because every eagle hunter or dealer today ought to know of the threat to the species and the public concern over this threat? But then shouldn't every land speculator (like Lucas) know of the threat to the beachfront or wetlands and of the public concern over this threat?

Jed Rubenfeld, *Usings*, 102 Yale L.J. 1077, 1152 (1993). *See also* Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 Stan.L.Rev. 305, 330 (1997) (*Lucas* Court did not "offer support for the questionable assumption that the state has traditionally regulated personal property more than real property.")

ment. In *American Pelagic Fishing Co. v. United States*, 49 Fed. Cl. 36 (2001), the Court of Federal Claims held that the owner of a fishing trawler was entitled to compensation when Congress passed a law that prohibited the ship from fishing for Atlantic mackerel and herring in U.S. waters. The Court found that the legislation had "dramatically reduced" the economic value of the vessel. *Id.* at 43. The Court of Federal Claims distinguished *Allard* as a case where "'it [was] not clear that appellees [would] be unable to derive economic benefit from the artifacts.'" *Id.* at 50 (*quoting Allard*, 444 U.S. at 66). The Court of Federal Claims relied on *Lucas* and held "that compensation is owed when government, by regulation, so completely destroys the beneficial uses of property that it is, in effect, idled." *Id.* at 46. The court equated "beneficial uses" with "profitable uses." *Id.* at 50. The Court of Federal Claims also observed:

> We are not confronted here with a property or a use which is inherently dangerous or a nuisance. There is nothing in the nature of a fishing vessel that suggests that any use is totally a matter of governmental grace. Absent such a built-in limitation, personal property, like land, comes with an inherent right of use. We note that the right to use is one of the "group of rights inhering in the citizen's relation to [a] physical thing." *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945).

Id. at 47.

Like this case, *American Pelagic Fishing Co.* involved personal property. Any economic use, let alone "profitable" use, of the antique artifacts in this case has been reduced at least as dramatically as that of the vessel in

American Pelagic Fishing Co. Eagle feathers are not "inherently dangerous or a nuisance." And what this Court said in *General Motors* is that "the right to possess, use *and dispose*" of property is part of the "group of rights inhering in the citizen's relation to the physical thing." *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945) (emphasis added). *See also Phillips v. Washington Legal Foundation*, 524 U.S. 156, 167 (1998) ("fundamental maxim of property law that the owner of a property interest may dispose of all or part of that interest as he sees fit"). Unlike Kornwolf, who could not have known at the time he obtained the Indian artifacts that they might someday be subject to a commercial ban, the owner of the fishing trawler knew at the time he obtained the ship that fishing rights were subject to federal regulation. Simple fairness dictates that whether a property owner receives a check from the government, like American Pelagic Fishing Co., or an electronic bracelet, like Kornwolf, should not turn on imaginary distinctions or mechanical application of an obsolete precedent that cannot logically be reconciled with subsequent opinions of this Court.

IV

Violation of the Takings Clause is a Defense to a Criminal Prosecution

The takings issue in this case is particularly sensitive because it arises in the context of a criminal prosecution and therefore implicates Kornwolf's liberty as well as his property interests. "The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." *In re*

Winship, 397 U.S. 358, 363 (1970). A criminal statute is unconstitutional on its face or as applied where it conflicts with some guarantee of the Bill of Rights, and the unconstitutionality of the statute is a defense in a criminal prosecution.[14] A statute "cannot be applied by judges, consistently with their obligations under the Supremacy Clause, when such an application of the statute would conflict with the Constitution." *Younger v. Harris*, 401 U.S. 37, 52 (1971). Indeed, the *Allard* plaintiffs themselves had standing because they might "face future criminal prosecutions for violations of the statutes." *Allard*, 444 U.S. at 64 n. 21. *See also United States v. Kepler*, 531 F.2d 796 (6th Cir. 1976) (considering Takings Clause defense to criminal conviction under Endangered Species Act). It has also long been held that where, as here, a particular application of a Congressional enactment violates the Takings Clause, that act as applied is void. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589, 601-02 (1935).[15]

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[14]*E.g.*, *Cohen v. California*, 403 U.S. 15 (1971) (free expression); *Stanley v. Georgia*, 394 U.S. 557 (1969) (right to receive information and ideas as part of freedom of speech and the press); *Haynes v. United States*, 390 U.S. 85 (1968) (Fifth Amendment privilege against self-incrimination).

[15]It is a testament to the confusion about the Takings Clause that the Eighth Circuit could suggest that the failure of the district court to order the return of the "buy" money in this case, *i.e.*, the $7000 payment for the dance shield and the $5000 downpayment on the headdress, might have somehow compensated Kornwolf for any taking. The Eighth Circuit readily acknowledged that there had been no determination below of the value of the artifacts and, therefore, of what would constitute "just compensation." In fact, the undercover agent had agreed to pay $15,000 for the headdress before it was seized pursuant to a search warrant.

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CONCLUSION

None of the courts below disputed Kornwolf's assertion that *Andrus v. Allard* is inconsistent with subsequent opinions of this Court. They simply concluded that until this Court reconsiders *Allard*, they have no choice but to follow it. Despite this Court's opinions in *Agins* and *Nollan*, neither Kornwolf nor any other defendant prosecuted under these statutes has ever received a judicial determination that the ban on sale of antique feathered Indian artifacts with a provenance

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Footnote 15 Continued

There is a more fundamental problem with the Eighth Circuit's suggestion. It implies that any constitutional defect in this criminal prosecution is cured if the government pays the defendant for his property after conviction. This suggestion was also implicit in the Government's argument below that a criminal defendant cannot raise a Fifth Amendment takings defense to a criminal prosecution. He can only seek damages in the Court of Federal Claims.

A similar Tucker Act argument was made in *Allard* and implicitly rejected by the *Allard* Court. Brief for Appellants at 13, 33-34, *Andrus v. Allard*, 444 U.S. 51 (1979). The Court of Federal Claims can only award money damages. It has no jurisdiction to determine that a statute fails to "substantially advance" a legitimate state interest. As this Court observed in *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992), an allegation that a statute does not substantially advance a legitimate state interest "does not depend on the extent to which [property owners] are deprived of the economic use of their particular pieces of property or the extent to which these particular [property owners] are compensated." Moreover, the Court of Federal Claims cannot reverse a criminal conviction, reimburse criminal fines, or restore a citizen's good name. In short, the government cannot cure a criminal statute that has the effect of unconstitutionally taking property by handing the defendant a check on the way to jail.

predating the statutory protection of the golden eagle "substantially advances" that protection. The question was not asked or answered in *Allard*.

No court has explained why Irving's ability to bequeath a $100 fractional interest in land is constitutionally protected while Kornwolf's ability to sell substantially more valuable feathered Indian artifacts is not. There is also no explanation how the government can intentionally destroy the market for, and *a fortiori* the economic value of, historically significant property yet escape the per se takings rule of *Lucas*. This lack of explanation begs the question why Kornwolf's burden is not one that "in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Addressing these issues in the context of this case will provide critical guidance to the lower courts and ameliorate the disparate treatment that property owners now receive there. Review by this Court may also save an important part of our history. The perverse legacy of *Allard* is that in its effort to preserve one part of this country's heritage, it has created incentives to destroy another. *See supra* note 8. While bald and golden eagles can be reclaimed through breeding,[16] there is no way to

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[16]The golden eagle, unlike the bald eagle, has never been listed as threatened or endangered under the Endangered Species Act. 16 U.S.C. §§1531, 1533 (list at 50 C.F.R. §17.11). A principal reason for protecting the golden eagle in 1962 was to give added protection to the bald eagle. During the first three years of its life, the bald eagle does not have the white head and tail of the adult and, therefore, it is difficult to distinguish from the golden eagle. As a result, bald eagles were sometimes killed by hunters seeking the golden eagle. *See* S. Rep. No.87-1986 at 1 (1962). Because of the

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regenerate authentic artifacts of this country's Native American past. This Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Robert T. Haar
Counsel of Record

Susan E. Bindler
Haar & Woods, LLP
1010 Market Street,
Suite 1620
St. Louis, MO 63101
(314) 241-2224

Counsel for Petitioner

Of Counsel:
Robert D. Miller
Robert D. Miller
and Associates
111 Marquette
Avenue South
Suite 3102
Minneapolis, MN 55401

Date: April 11, 2002

Footnote 16 Continued

recovery of the bald eagle population, the Department of Interior has proposed removing the bald eagle entirely from the endangered species list. *See* 66 Fed. Reg. 61663, 61697 (Dec. 3, 2001).